Editor's note: 81 I.D. 14; Appealed -- dismissed (without prejudice), Civ. No. 4-74-10 (D.Idaho Dec. 3, 1975); See US v. Swanson, 34 IBLA 25 and Elder H Swanson 93 IBLA 1 for additional history.

UNITED STATES

v.

ELMER M. SWANSON

IBLA 73-338 Decided January 16, 1974

Appeal from a decision of Administrative Law Judge Robert W. Mesch 1/ holding three mining claims null and void and dismissing a complaint against seven millsite claims. (Contests: Idaho 1347, Idaho 4090.)

Affirmed in part; reversed in part.

Mining Claims: Discovery: Generally

> To constitute a discovery on a lode mining claim there must be an exposure on the claim of a lode or vein bearing mineral which would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

1/ The title "Administrative Law Judge" replaced that of "Hearing Examiner" by order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

Mining Claims: Discovery: Generally

Evidence of mineralization which might warrant further exploration work within a claim rather than development of a mine is not sufficient to constitute a discovery of a valuable mineral deposit.

Mining Claims: Millsites

A millsite claimant is entitled to receive only that amount of land needed for his mining and milling operations, and this amount can embrace a tract of less than five acres. There is nothing within the relevant statute which prevents the Government from granting less than five-acre tracts when need for a lesser amount of surface area is indicated. The reference to five acres within the relevant statute is a maximum, not an absolute, automatic grant.

Mining Claims: Millsites

A millsite claimant, when challenged by the Government, must demonstrate use or occupation of all the area claimed within each

millsite location before he will be granted a patent for the full amount requested. That area which is not proved to be needed for mining and milling purposes may not go to patent.

Act of August 22, 1972--Millsites: Patents--
Millsites: Issuance--Mining Claims: Patent

Section 12 of the Act of August 22, 1972, 86 Stat. 612, revoked the authority of the Secretary of the Interior to issue patents for locations and claims in the Sawtooth National Recreation Area. Valid millsite claims situated within the recreation area may not go to patent, but such result does not prevent or interfere with the full exercise of a claimant's right to further work and develop his valid millsite claims subject to compliance with the rules and regulations covering federal land on which such claims are located.

APPEARANCES: James C. Herndon, Esq., Salmon, Idaho, for contestee; Erol R. Benson, Esq., Office of the General Counsel, Department of Agriculture, Ogden, Utah, for contestant.

OPINION BY MR. RITVO

Elmer M. Swanson has appealed to the Secretary of the Interior from a decision dated March 7, 1973, by Administrative Law Judge Robert W. Mesch, insofar as it held the Rex, Zee and Zenna lode mining claims null and void. The Forest Service, United States Department of Agriculture, has appealed to the Secretary of the Interior from the same decision insofar as it dismissed the complaint challenging the validity of the High Tariff, Clara, Little Falls, Livingston, May, Trensvalle, and Deadwood millsites.

At the request of the Forest Service, the Idaho State Office, Bureau of Land Management, issued complaints challenging the validity of the above three lode mining claims and seven millsites. The two contests were consolidated for purposes of convenience and a hearing was held on July 11 and 12, 1972, at Salmon, Idaho.

Aside from Swanson being the contestee in both complaints, there is no relationship between the lode mining claims and the millsites. They will be treated separately in this opinion. The mining claims will be considered first.

Mining Claims

The Rex, Zee and Zenna lode mining claims are located in secs. 9 and 10, T. 9N., R. 17 E., B.M., Custer County, Idaho, Challis National Forest. 2/ The Zee and Zenna claims were located in October of 1967, and the Rex claim was located in March of 1968.

The contest against these claims was filed on April 15, 1971. The complaint charged:

1. The land embraced within the limits of the claims is nonmineral in character.

2. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.

3. The claims are not being held in good faith for bona fide mining purposes.

The evidence indicated that there were no workings or improvements on the claims other than a road that crosses the three claims. The road was constructed in 1969 by Swanson allegedly to provide access to potential drill sites on the claims. No drilling was ever done and the road has served as a convenient access to the contested millsites owned by the contestee.

2/ The Rex and Zee lode claims and the seven millsites are all embraced within the boundaries of the Sawtooth National Recreation Area, established by the Act of August 22, 1972, Public Law 92-400, 86 Stat. 612.

The Government's witnesses testified that they had examined the claims, taken and analyzed samples, and the results of their examination did not show minerals of any significant value. Vernon T. Dow, a mining engineer for the Forest Service, expressed the opinion that a person of ordinary prudence would not be justified in the expenditure of time and money to develop the claims, nor even to further explore the claims. (Tr. 42, 43, 44.) Ed Barnes, a mining engineer for the Bureau of Land Management, testified that he could find no mineral deposits that would warrant development of the claims. (Tr. 61.)

The contestee testified that his spectographic analysis of the claims indicated appreciable amounts of various minerals. (Tr. 77.) He stated that in 1969 he drove 4500 feet through the claims making a cut for a road in order to bring in a drilling machine, but was unable, as yet, to obtain the services of someone to drill the claims. (Tr. 70, 72.)

Following the hearing, a post-hearing brief was submitted by the contestee. It reads, in pertinent part:

> * * * he does not come before the Hearing Examiner and seriously contend that there is sufficient mineral present to warrant further development. However, Contestee wants it clearly understood by the Hearing Examiner that at the time he located the claims he did so in good faith and that it was not until further work was done on the claims that there was an indication to him that perhaps mineral was not in sufficient quantities to warrant further development. (Brief at 2.)

> * * * At this time Mr. Swanson does not urge that the mineral found to date on the three claims passes the reasonable prudent-man test. However, the Contestee points out that the evidence clearly shows that he acted prudently at the time he discovered the claims and that he acted as a reasonable and prudent miner would. He also urges that it is clear that a roadway across the three claims was the best access to the high country beyond, for everyone concerned * * *. (Brief at 4.)

After reviewing the complete record, the Judge concluded that valuable minerals had not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws. Accordingly, the mining claims were declared null and void.

On appeal, the contestee asserts that the Administrative Law Judge incorrectly applied the prudent man test to the facts presented at the hearing. While Swanson concedes that the surface mineralization itself does not warrant additional development, he argues that there was sufficient mineralization to justify further exploration by core-drilling on the claims:

> The point that the Contestee makes on appeal is that a minor (sic) would be considered reasonable and prudent in core-drilling the property. The fact that the reasonable, prudent minor (sic) test was limited only to surface discovery is in error. (Statement of Reasons at 2.)

This argument is without merit as the Administrative Law Judge applied the correct test. The standard applied by the Department of the Interior to determine the validity of mining claims is well

established. To constitute a discovery upon a lode mining claim there must be an exposure on the claim of a lode or vein bearing mineral which would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599, 602 (1968).

Appellant is basically arguing that the mineralization exposed on the surface of the claims justifies further exploration to determine whether a valuable mineral deposit exists. This does not constitute a discovery. In United States v. Gondolfo, 9 IBLA 204, 207 (1973), the Board stated:

> * * * Evidence of mineralization which may justify further exploration in hope of finding a valuable mineral deposit is not synonymous with evidence of mineralization which will justify the expenditure of labor and money with a reasonable prospect of success in developing a valuable mine. Only the latter constitutes discovery. Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States of America v. Charles W. and Cora A. Kohl, 5 IBLA 298 (1972); United States v. New Mexico Mines, Inc., 3 IBLA 101 (1971); Marvel Mining Co. v. Sinclair Oil and Gas Co., et al., 75 I.D. 407 (1968).

The evidence clearly demonstrated that mineralization exposed on the mining claims did not warrant development. Accordingly, the Judge's conclusion that valuable minerals had not been found within the limits of the claims so as to constitute a valid discovery was correct, and the Rex, Zee and Zenna lode mining claims were properly declared null and void.

Millsites

The High Tariff, Clara, Little Falls, Livingston, May, Trensvalle and Deadwood millsites are located in approximate secs. 1 and 12, unsurveyed T. 9 N., R. 16 E., B.M., Custer County, Idaho. They are situated on both sides of Jim Creek just above its confluence with Big Boulder Creek in the Challis National Forest. The millsites are contiguous and each contains five acres of land. They were located on November 8, 1967, in connection with seven patented lode mining claims bearing the same names as the millsites. All seven are now being used to some degree in connection with the patented lode mining claims known as the Livingston Mine.

On April 21, 1967, Elmer Swanson filed an application for a patent covering the millsites. On April 9, 1968, the Government initated a contest against this patent application. In its complaint, the Government charged:

1. The said mill sites are not being used for bona fide mining or milling purposes.

2. The said mill sites are not being used for nor occupied by a mill or reduction works nor associated facilities.

3. All said mill sites are not laid out in as regular a form as reasonably practicable.

At the hearing, the Government's witnesses testified that they had not seen any milling or mining operations on the millsites until

the time of the hearing. Marvin Larson, former District Forest Ranger, stated that during his estimated 50 visits to the millsites between 1958 and 1969, he did not see any milling or mining operations. (Tr. 99.) Dan Pence, District Forest Ranger since 1969, testified that he never saw any use being made of these claims for mining or milling purposes. (Tr. 119.) Both men testified that the sites had been used for other purposes such as the rental of cabins, horses, and shower facilities, and the sale of candy, postcards, and gasoline. (Tr. 100, 103, 120.)

Swanson testified that he and other workmen had for many years lived on the millsites while work was being done to recondition the Livingston Mine and stockpile ore from the mine onto the millsites. (Tr. 108, 109.) On April 24, 1972, after initiation of this contest but before the hearing, Swanson entered into a lease-purchase agreement with Mine Developers, Inc., an experienced mining concern. In April of 1972, the company sent a crew of men to the property to work on the mill and other facilities on the millsites. Swanson testified that under this agreement the Livingston Mine and the seven millsites are presently being operated for mining and milling purposes. (Tr. 183, 198.)

Both sides gave further testimony regarding the quantum of land being used for mining and milling purposes. This testimony will be discussed below.

In his decision, the Judge gave the following description of the millsites:

The individual mill sites contain the following improvements and/or have been put to the following uses:

High Tariff	Manager's house, assay office, office, bunkhouse, two storage buildings, a school, two unidentified buildings, and connecting roadways.
Clara	Eight separate structures identified as living quarters, an unidentified building and connecting roadways.
Little Falls	Five separate structures identified as living quarters, storage of ore and connecting roadways.
Livingston	One structure identified as living quarters, storage of ore, a bridge and connecting roadways.
May	Tailings pond, storage of ore and connecting roadways.
Trensvalle	Ball and flotation mill, crusher, shop, tank, tailings pond, storage of ore and connecting roadways.
Deadwood	Tailings pond and connecting roadways.

After reviewing the record, Judge Mesch concluded:

I find that the High Tariff, Clara and Little Falls mill sites are valid. I am not willing, however, to conclude that the Livingston, May, Trensvalle, and Deadwood mill sites are valid with respect to all of the land included within the mill sites. The evidence presented by the Forest Service does not support the assertion that more land is included within these four mill sites than is necessary for the storage of ore. However, the evidence as a whole is not adequate to sustain the conclusion that all of the land within the four mill sites is necessary for mining or milling operations.

Having made this finding, the Judge then ordered that the complaint challenging the validity of the seven millsites be dismissed because the evidence did not support the Government's allegations in the complaint.

On appeal, the Government contends generally that the Administrative Law Judge's decision was incorrect in the following respects: (1) in finding that the millsites were productive, used for bona fide mining and milling purposes, and not held for speculative use; (2) in concluding that the Government had not demonstrated that more land was located than actually needed for mining and milling operations; (3) in not making a finding that, even if the claims were valid, they could not be patented since they were situated within the Sawtooth National Recreation Area.

Patenting nonmineral lands as millsites is authorized by 30 U.S.C. § 42 (1971). The portion of section 42 here applicable reads as follows:

> Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such nonadjacent land shall exceed five acres. * * *

The first question presented centers on whether Swanson has sufficiently complied with the law's requirement that the lands be "used or occupied * * * for mining or milling purposes." In Charles Lennig, 5 L.D. 190, 192 (1886), the Department enlarged upon the statutory language:

> The second clause of this section manifestly makes the right to patent a mill site dependent upon the existence on the land of a quartz-mill or reduction-works. But the terms of the first clause are more comprehensive. Under them it is not necessary that the land be actually a "mill-site." They make the use or occupation of it for mining or milling purposes the only pre-requisite to a patent. The proprietor of a lode undoubtedly "uses" non-contiguous land "for mining or milling purposes" when he has a quartz mill or reduction-works upon it, or when in any other manner he employs it in connection with mining or milling operations. For example, if he uses it for depositing "tailings" or storing ores, or for shops or houses for his workmen, or for collecting water to run his quartz-mill, I think it clear that he would be using it for mining or milling purposes. I am also of opinion that "occupation" for mining or milling purposes, so far as it may be distinguished from "use," is something more than mere naked possession, and that it must be evidenced by outward and visible signs of the applicant's good faith. The manifest purpose of Congress was to grant an additional tract to a person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it. Therefore, when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.

The Government contends that Swanson has not met the test set out in Lennig in that there was no productive use of the millsites for mining or milling purposes. We do not agree with this contention. While there was testimony indicating that various non-mining

activities were being engaged in and that only a minor amount of ore had been withdrawn from the Livingston Mine, there was still adequate evidence of mining and storage activity demonstrating good faith use and occupation for mining and milling purposes.

Appellant invested a considerable sum of money in acquiring his mining and milling properties and spent a number of years devoting labor and means to reconditioning the Livingston Mine and extracting and stockpiling millable ore. In 1972, appellant entered into a lease-purchase agreement with Mine Developers, Inc., in order to further exploit the worth of his mine and millsites. The Livingston Mine is now operative and the flotation mill above Jim Creek on the Trensvalle millsite has been put into production. The Judge concluded, and we agree, that the evidence demonstrated a good faith intention to use some of the land within the contested millsites for mining and milling purposes.

The major problem in this case revolves around the Government's second contention that more land was located than actually needed for mining and milling purposes. The Government argues that a millsite claimant can only locate and patent land which is reasonably necessary for use in his mining and milling operation. Swanson is accused of having laid out his claims in an improper form in that he has not attempted to make economical use of public land in such a way as to take the minimum required amount necessary for his operation.

In the case of Hard Cash and Other Mill Site Claims, 34 L.D. 325, 327-328 (1905), the Department said:

> * * * It was stated in Alaska Copper Company case, supra, p. 130, that "whilst no fixed rule can well be established, it seems plain that ordinarily one mill-site affords abundant facility for the promotion of mining operations upon a single body of lode claims." It follows that if more than one mill-site is applied for in connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown. The storage of a quantity of ore upon each of the four mill-sites in this case, where there is nothing to show but that the area embraced in one of them would be ample for such storage, is but a mere colorable use of the mill-sites, which does not satisfy the requirements of the statute.

Hard Cash indicates the strictness of scrutiny which will be given to applications for multiple millsites. The decision signifies that use and occupancy of land in excess of one millsite, even for a group of lode claims, will be allowed only insofar as the applicant is able to show a reasonable need for all the lands claimed.

In this instance, the Government is not looking to invalidate all but one millsite. Rather, the Government has charged in its complaint that all of the millsites are not laid out in as regular a form as reasonably practicable in that certain millsites, or portions of them, are not required for the contestee's operation.

In J. B. Hoggin, 2 L.D. 755 (1884), the Secretary ruled on a case wherein the claimant had attempted to patent two pieces of land

as millsites, one of 4-1/2 acres, another of 1/2 acre, in conjunction with a patent for a lode mining claim. The Commissioner had ruled that the claimant had to choose between which of the two sites it wished to use, but could not use both. The Secretary overruled this decision and held that since the amount in both locations did not exceed the five-acre maximum, both millsites should be permitted to stand. What is worth noting is the closing paragraph within the decision at 756:

> I may add that in some instances it might be necessary for the proprietor of the vein or lode to use or occupy only one piece of nonadjacent surface ground for mining or milling purposes, and in other instances more than one piece might be quite necessary and proper. I think the practice under said section should be to allow the entry of such number of pieces, within the restriction of five acres, as may appear to be necessary for such mining and milling purposes.

The Secretary's interpretation of how the statute should be administered clearly indicates that a claimant is entitled to receive only that amount of land needed for his mining and milling operations, and this amount can embrace a tract of less than five acres. Furthermore, there is nothing within the statute which prevents the Government from granting less than five-acre tracts when need for a lesser amount of surface area is indicated. The statute states that the location shall not "exceed five acres." Webster's New World Dictionary, College Edition (1973) defines exceed as follows: "to go or be beyond (a limit, limiting regulation, measure, etc.) * * *." The reference to five acres in the statute is clearly a ceiling measure, not an absolute, automatic grant.

We believe that in granting a gratuity of a millsite the Government is entitled to require efficient usage, so that only the minimum land needed is taken. All other land can then be retained by the Government to be used for public purposes rather than for possible non-mining use.

The Board concludes that the law requires a claimant, when challenged by the Government, to demonstrate use or occupation of all the area claimed within a millsite location before he will be granted a patent for the full amount requested. That area which is not proved to be needed for milling and mining purposes may not go to patent.

In the case at hand, the evidence indicated, and the Judge so concluded, that the claimant had not demonstrated that he needed all of the land area for mining and milling operations. 3/ Despite this finding, the Judge dismissed the complaint, apparently due to the Judge's belief that the Government had not adequately demonstrated that more land is included within the millsites than needed for storage of ore.

The Judge apparently limited the thrust of the third charge to the question of whether the four easterly claims contained more land than is necessary for the storage of ore. The Judge seems to

3/ See Judge's conclusion quoted in the text, supra.

have meant that the claims included no more land best suited for storage than necessary. He did not imply that all of the land in these claims was necessary for storage. The record makes it plain that only part of these claims is needed for that purpose. Contestee's witness testified that only five acres would provide storage for the maximum amount that would be held on the claims and for maneuvering of trucks and loaders (Tr. 215, 216) while the four claims cover 20 acres.

We read the third charge more broadly. It includes the general allegation that the claims were laid out to cover more land than was needed for any legitimate mining and milling purpose. The Government's emphasis on storage of ore arose naturally from the fact that this was the only use attributed to the portions of the claims not used for housing and administration (the three westerly claims and a small part of the Livingston) or for the mill (the northern third of the Trensvalle and a tiny bit of the Deadwood). Thus, even if we assume that five acres is necessary for storage of ore and no more than that for the mill, crusher and shop, there is still some seven to ten acres in the four easterly claims to which no usage can be assigned.

The Government's witnesses testified that more land was being used than was needed for mining and milling purposes. Larson

testified that in 1967, he discussed with Swanson the patentability of the area south of Jim Creek on the Livingston, May, Trensvalle and Deadwood millsites. He pointed out to Swanson that about nine acres covered with Douglas fir timber were not being used for mining or milling purposes and that the Government would object to that part of the millsites going to patent. (Tr. 126.) Larson stated that Swanson later reacted to this warning by clearing the trees off the area and storing small quantities of ore on all the sites. (Tr. 127.)

Dow described the storage of the ore as laid out in several different rows, all of which could have been put on any one of the millsites. (Tr. 134.) He concluded that given normal production, all that would be needed was some areas north of Jim Creek for mill, tailings and storage. (Tr. 135.) On cross-examination, Dow did testify that the millsites proposed for storage by the claimant would be more economical to use than alternative, unrelated millsites owned by Swanson. (Tr. 227.) He did not suggest, however, that all of the millsites in dispute were needed for storage.

To be more explicit, we may examine the particulars of the millsite claims.

First, several general observations may be helpful. A strip of forested land lies along the southern portion of these claims, approximately

100 feet by at least 600 feet. (Tr. 216.) The contestee does not plan to use that area for storage. (Tr. 216, 217.) The creek known as Jim Creek, cuts across the claims in a northwesterly direction from about 200 feet north of the southeast corner of the Deadwood, the most easterly claim, through the center of the Livingston, the central claim of the seven, to about 150 feet south of the northeast corner of the High Tariff, the most westerly claim. Swanson's witnesses testified that the best area for storage lay in that part of the four easterly claims south of Jim Creek. (Tr. 170, 213, 214, 220, 221.) One estimated that there were five acres running through these claims between the creek on the north and the timber on the south. (Tr. 215-217.) While the area south of Jim Creek may be the most desirable storage area, other parts of the claims are also suitable for storage. (Tr. 134, 136, 139, 204.)

Going from west to east, we note that the High Tariff, Clara, and Little Falls millsites have a total of thirteen structures identified as living quarters. Additionally, there is a bunkhouse and manager's house on the High Tariff. The contestee gave no indication that all of these quarters would be needed for his operation. (Tr. 109, 110.) Furthermore, Dow testified that the Clara and High Tariff millsites would be sufficient for men's quarters and offices. (Tr. 135.)

Most of the structures on the three westerly claims are situated within the middle sections of the claims. We note that practically all of the southern portions are covered with timber with also a scattering of wooded area in the northern one-third sections. No mining or milling purposes have been assigned to these areas. (Tr. 216, 217.)

Moving east to the Livingston millsite we find one structure identified as living quarters situated in the center of the claim a short distance from its western boundary. The only other use is storage on a small area in its southeastern part. Jim Creek divides the Livingston into approximately equal northern and southern halves. The cabin referred to above is also in the southern half. What use then is to be attributed to the northern part of this millsite?

Next, comes the May, the first of three sites measuring 217.8 feet from east to west and 1000 feet from north to south. Only the southern third lies south of Jim Creek. The northern third might be necessary as a maneuver area for the mill complex situated to the east on the Trensvalle, but as the record reveals, the center portion of the claim has been assigned no function.

Next, comes the Trensvalle. Its northern third contains mill buildings. Again not more than a third lies south of Jim Creek.

Part of the center is occupied by a tailings pond, which is unsuitable for ore storage. Thus the center third of the claim has no purpose. (Tr. 212.)

The east claim is the Deadwood. No more than a quarter of it lies south of Jim Creek. Its center is covered by part of the old tailings pond which begins on the Trensvalle, and is unsuited for storage. Its westerly boundary runs through the extreme northeast corner of the crusher. Thus, moving the claim line ten feet or so to the east would have put the entire building in the Trensvalle claim. (Ex. 7.) Again, there is a large area of the claim to which no mining and milling purpose can be assigned.

Thus, we can only conclude that the record demonstrates that these seven claims encompass an area substantially in excess of what is needed for mining and milling purposes.

The appellant's witnesses did not offer evidence justifying usage of all of the areas covered by the millsites.

Lawrence Baker, a mill operator at the Livingston mine and witness for the claimant, testified on direct examination that in his opinion all of the land claimed would be used for storage. (Tr. 173.) However,

on cross-examination he admitted that the ore was not presently being stored in an efficient and economical manner in that it would be preferable to push it up high and consolidate the ore rather than let it lay out in long, low strips. (Tr. 180.)

Frank Taft, a mining engineer employed by Mine Developers, Inc., testified that the most suitable area for storage would be the land below Jim Creek and that a large portion of the four easterly claims would be required. (Tr. 214.) On cross-examination Taft stated that his opinion was based upon an estimation that 60,000 tons of ore would be stored on the sites. (Tr. 219.) He then admitted that 30,000 tons would be a more reasonable figure, thus cutting in half the "portion" required for storage. (Tr. 220.)

The Department has held that a millsite is a location under the mining laws of the United States subject to the same procedural requirements as mining locations. Eagle Peak Copper Mining Co., 54 I.D. 251, 253 (1933); James W. Nicol, 44 L.D. 197, 199 (1915). Where, as here, the claimant's compliance with the applicable law is challenged by the Government and a prima facie showing is made that the claims are invalid, the burden then shifts to the appellant to show by a preponderance of the evidence that the claims are valid. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Murer, 4 IBLA 242, 244 (1972); United States v. S.M.P. Mining Co., 67 I.D. 141, 144 (1960). The appellant has not met its burden as to these seven claims.

It is the conclusion of the Board that the appellant has failed to sustain the burden of showing such present occupation or use of the seven millsites, as now located, as would satisfy the requirements of the statute. Accordingly, the Judge's decision insofar as it dismissed the complaint with respect to the seven millsites is set aside. While all of the claims may not be held valid as presently located, we do not believe that they should be invalidated in toto since there are areas within each of the millsites that have been used or occupied for mining and milling purposes. Neither do we deem it feasible to select the millsite areas that the contestee may properly retain. The contestee is therefore allowed 90 days from receipt of this decision within which to amend his millsite locations to bring them into compliance with the law as we have discussed it. See United States v. Guidoni, A-30414 (October 28, 1965).

If he does so, but the Forest Service deems the new locations still not to be in accordance with the views expressed herein, it may submit its views to this Board.

If he does not amend his locations, the Forest Service will submit to this Board its recommendations describing which parts of the claims should be held invalid. The Board will then issue a final decision.

All documents are to be served upon the adverse party in accordance with the Board's rules of practice.

As to the Government's third contention that no patents may be granted on appellant's valid millsite claims because they are located within the Sawtooth National Recreation Area, we must agree. The Act creating this recreation area provides in section 12 that:

> Patents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States. (Act of August 22, 1972, 86 Stat. 615.)

Appellant argues that section 12 was not meant to have a retroactive effect but was only intended to apply to patent applications made after the enactment period. As appellant's millsites were located and challenged prior to the enactment of the Act, appellant claims that the section does not apply to his claims.

Appellant's interpretation of section 12 is incorrect. 4/ Congress intended that this section should, in fact, preclude the issuance of patents to claimants holding valid, existing interests prior to enactment of the Act. In describing the impact of section

---

4/ While section 12 was intended to extinguish the right of existing claim holders to proceed to patent on any claim within the recreation area, section 10 of the Act withdraws the land from future mining claims:

> "Subject to valid existing rights, all Federal lands located in the recreation area are hereby withdrawn from all forms of location, entry and patent under the mining laws of the United States." (Act of August 22, 1972, 86 Stat. 612.)

12, Representative Roy A. Taylor, Member of the Committee on Interior and Insular Affairs and Chairman of the National Parks and Recreation Subcommittee stated:

> As I have pointed out, any person holding a valid claim is entitled to proceed to patent and thereby acquire fee title to the lands involved. Section 12, in effect, extinguishes that right with respect to lands located within the recreation area. While this probably creates a right to some compensation, its value may not be too significant since the right to prospect, develop, and mine the claim is protected by the terms of the bill.
>
> (Congressional Record, H. 325, Jan. 26, 1972.)

Section 12 of the Act of August 22, 1972, 86 Stat. 612, revoked the authority of the Secretary of the Interior to issue patents for locations and claims in the Sawtooth National Recreation Area. Accordingly, those millsite claims of the contestee subsequently found to be valid may not go to patent. This conclusion, however, should not be construed as preventing or interfering with the full exercise of the claimant's right to further work and develop his valid millsite claims subject to compliance with the rules and regulations covering federal land on which such claims are located.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed with respect to the Rex, Zee and Zenna lode mining claims.

The decision is reversed with respect to the High Tariff, Clara, Little Falls, Livingston, Deadwood, Trensvalle and May millsites and remanded for action consistent with the views expressed herein.

_____
Martin Ritvo, Member

We concur:

_____
Douglas E. Henriques, Member

_____
Edward W. Stuebing, Member